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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 552

ESTATE OF EDWARD A. CUNHA, DECEASED, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, EXECUTOR, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	10
Appendix A (Opinion of United States Court of Appeals for the Ninth Circuit)	1a
Appendix B (Judgment of United States Court of Appeals for the Ninth Circuit)	11a
Appendix C (Internal Revenue Code statute involved)	12a
Appendix D (California Probate Code statute involved)	15a

CITATIONS

CASES:

Gale, Margaret R., 35 T. C. No. 27 (1960)	8
Quivey v. *United States*, 176 F. Supp. 433 (Nebr. 1959)	5, 6, 7
Rensenhouse, Estate of, 27 T. C. 107 (1956), reversed and remanded, 252 F. (2d) 566 (C.C.A. 6, 1958), decision upon remand 31 T. C. 818 (1959)	6, 8, 9
Shafer v. *United States*, 60-1 U.S.T.C. Par. 11,949 (S. D. Iowa, 1960)	5, 6, 7

STATUTES:

Internal Revenue Code of 1939:	
Section 812 (b)	7
812 (b)(5)	6, 7
812 (c)	2, 4, 7, 9
812 (c)(1)(B)	4

Page

Revenue Act of 1950:
Section 502 6

Judicial Code:
28 U. S. C. Section 1254(1) 2

California Probate Code:
Section 680 ..... 2, 3
682 2

Revenue Ruling 83, 1953-1 Cum. Bull. 395 ..... 8, 9

Congressional Committee Reports:

House Report No. 2319, 81st Congress, 2nd Session .. 7
Senate Report No. 2375, 81st Congress, 2nd Session, 1950 U. S. Code Cong. Serv., Vol. 2 7

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 23, 1960.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 43-51) is reported in 279

F. 2d 292 and is printed in Appendix A, *infra*, pp. 1a-10a. The opinion of the United States Tax Court (R. 24-33) is reported in 30 T. C. 812.

JURISDICTION

The opinion and judgment (Appendix B, *infra*, p. 11a) of the Circuit Court of Appeals were entered on May 23, 1960. A timely petition for rehearing was denied on August 31, 1960. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether a maintenance allowance paid to a decedent's widow pursuant to Section 680 et seq. of the California Probate Code qualifies as a marital deduction for federal estate tax purposes under Section 812(e) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The provisions of Section 812(e) of the Internal Revenue Code of 1939 are set forth in Appendix C, *infra*, pp. 12a-14a. The provisions of Sections 680 to 682, inclusive, of the California Probate Code are set forth in Appendix D, *infra*, p. 15a.

STATEMENT

The findings of fact of the Tax Court (R. 25-26) may be summarized as follows:

Decedent Edward A. Cunha died testate on August 6, 1954, a resident of San Mateo County, California. He was survived by his widow, Helen V. Cunha, and by his son, William Edward Cunha. Petitioner herein was appointed Executor of the decedent's estate on

August 18, 1954 by the Superior Court of the State of California in and for the County of San Mateo.

On September 2, 1954, the probate court after due notice and hearing entered an order, pursuant to the provisions of Section 680 et seq. of the California Probate Code, for the payment of a maintenance allowance to decedent's widow in the amount of $600 per month. By order of the probate court dated December 6, 1954, this allowance was increased to $900 per month. The total allowance paid to the widow during the period of the probate proceedings, which terminated in November 1955, was $10,500.

Under the terms of decedent's will, after some small specific bequests, the residue of the decedent's estate was devised and bequeathed in the ratio of 40% to the widow, and 60% to decedent's son.

The federal estate tax return filed by the executor on behalf of the decedent's estate with the District Director of Internal Revenue of San Francisco, California, reflected a total gross estate in the sum of $392,634.95 and a net estate on which basic tax was payable in the sum of $102,715.65. The net estate for additional tax was shown to be $142,713.65. Under Schedule M there was set out the total sum of the allowance of $10,500 which had theretofore been paid to the widow, and this was deducted in full as part of the marital deduction.

The Commissioner of Internal Revenue disallowed 60% of this deduction and increased the net taxable estate by the sum of $6,300 and determined a deficiency of $1,738.80.

In the Tax Court, the Commissioner contended that 60% of the allowance to the surviving widow failed to

qualify for the marital deduction by reason of the provisions of Section 812(e)(1)(B) of the Internal Revenue Code of 1939 (the so-called "terminable interest rule"). The Commissioner's argument was that such portion of the allowance to the surviving widow was a terminable interest because under California law the widow's right to the allowance would terminate or fail upon her death or remarriage. The Tax Court held for the Commissioner.

On appeal to the Circuit Court of Appeals, the taxpayer conceded that an allowance to a surviving widow under the applicable sections of the California Probate Code is an interest that will terminate or fail "upon the lapse of time", or "upon the occurrence of an event or contingency". (Quoted portions are from Section 812(e)(1)(B) of the Internal Revenue Code of 1939). The taxpayer pointed out, however, that under Section 812(e)(1)(B) an otherwise terminable interest can be denied deduction only if (i) an interest in the same property passed to a person other than the surviving spouse and (ii) such other person may possess or enjoy all or part of the same property, after the failure or termination of the interest of the surviving spouse. The taxpayer argued that, in this case, only the surviving widow had an interest in the maintenance allowance granted her by the probate court, that such maintenance allowance was the "property" as that term is used in Section 812(e) of the 1939 Code, that no interest in such property passed to a person other than the widow and no such other person could possess or enjoy any part of such property, and that, accordingly, the maintenance allowance was not a nondeductible terminable interest.

In the Circuit Court of Appeals, the Commissioner contended that the "property" was the estate assets, that the maintenance allowance awarded the widow by the probate court was an interest in such property, that the decedent's son, as a residuary legatee under the decedent's will, also had an interest in such property, since the son's share of the estate assets would have been augmented upon the termination or failure of the maintenance allowance awarded the decedent's widow, and that, therefore, the maintenance allowance was a nondeductible terminable interest.

The court below affirmed the decision of the Tax Court after concluding "that the right to a widow's allowance in California is a terminable interest in the estate assets; that in the instant case another interest in said assets passed from the decedent to his son . . .; and that the son is entitled to possess and enjoy a portion of said assets upon the termination of the widow's right to an allowance." (R. 51).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with a decision of the District Court for the District of Nebraska in *Quivey* v. *United States*, 176 F. Supp. 433 (1959). The *Quivey* case is on appeal to the United States Court of Appeals for the Eighth Circuit and arguments were had therein on September 15, 1960. It is reasonable to suppose that a decision therein is imminent. The decision of the court below is also in conflict with the decision in *Shafer* v. *United States*, 60-1 U. S. T. C. Par. 11,949 (S. D. Iowa, 1960) in which the court stated that its decision was controlled by the *Quivey* case. The United States filed an appeal in the United States Court of Appeals for the Eighth

Circuit in the *Shafer* case on September 15, 1960. The decision of the court below is also in conflict with the "concurring in part dissenting in part" opinion of Judge Pierce in *Estate of Rensenhouse*, 31 T. C. 818 (1959):

The decisions in the *Quivey* and *Shafer* cases, *supra*, and the "concurring in part dissenting in part" opinion in *Estate of Rensenhouse*, *supra*, all accept the contention made in the instant case by the taxpayer in the court below.

The refusal of the court below to accept taxpayer's contention was premised on a construction by the court of congressional intention as revealed by the legislative history of the Revenue Act of 1948, which was the Act which added the provisions for a marital deduction to the Internal Revenue Code of 1939. But the legislative history of the Revenue Act of 1948 was entirely too narrow a base on which to make accurate estimate of the congressional purpose as respects the qualification for the marital deduction of maintenance allowances paid to a surviving spouse. At the time of the adoption of the Revenue Act of 1948, and for two years thereafter, maintenance allowances paid to a surviving spouse were specifically deductible for federal estate tax purposes under Section 812(b)(5) of the 1939 Code. There was, therefore, no occasion, in connection with its passage of the Revenue Act of 1948, for Congress to give meaningful consideration to the question of the effect of the marital deduction provisions on maintenance allowances paid to a surviving spouse. The occasion for meaningful consideration of this question by Congress only arose in 1950 when Section 812(b)(5) of the 1939 Code was repealed by Section 502 of the

Revenue Act of 1950. In connection with such repeal, both the Senate Finance Committee and the House Ways and Means Committee stated (Senate Report No. 2375, 81st Congress, 2nd Session, 1950 U. S. Code Cong. Serv., Vol. 2, p. 3191; House Report No. 2319, 81st Congress, 2nd Session, p. 136):

> "Under existing law amounts expended for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allowable as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)."

This very relevant evidence of Congressional purpose was rejected by the court below. In respect of both the Senate and House reports covering the repeal of Section 812(b)(5) of the 1939 Code, the court below observed "they bear no weight". (R. 51).

Not only did the court below misconstrue the congressional intention concerning the qualification of maintenance allowances for the marital deduction, but judged by its excessive reliance on the legislative history of the marital deduction provisions of the Revenue Act of 1948, the court below may have meant to hold that no maintenance allowance for a surviving spouse of any state can qualify for deduction under the marital deduction provisions because a maintenance allowance does not pass from the decedent to his surviving spouse. If this is an accurate estimate of the decision of the court below, then that decision would be in conflict with the *Quirey* and *Shafer* cases even

though the Circuit Court of Appeals for the Eighth Circuit might ultimately affirm the decisions in such cases on grounds different from the grounds on which the decisions were premised by the trial courts.

2. The question in this case is an important one which should be settled. The present situation is a chaotic one which results in discrimination among the states in the impact of the federal estate tax and defeats the general objective of obtaining a uniform application of the estate tax laws.

The Commissioner of Internal Revenue originally took the position that a maintenance allowance for a widow is deductible under the marital deduction provisions if the allowance under the law of the particular state is a vested right of property such as would, in the event of the widow's death, survive as an asset of her estate. *Revenue Ruling* 83, 1953-1 Cum. Bull. 395. Under this vested right theory, the maintenance allowances of some states would not qualify for deduction while those of other states would. Indeed, under the vested right test, the maintenance allowance of a particular state could be deductible or nondeductible depending on the precise section of state law under which it was authorized. *Margaret R. Gale*, 35 T.C. No. 27 (1960).

After the Commissioner had issued *Revenue Ruling* 83, he reversed his field completely. When the *Estate of Rensenhouse* was first considered by the Tax Court, the Commissioner took the position that no maintenance allowance of any state could qualify for deduction as a marital deduction because a maintenance allowance was not an interest in property which passed from the decedent to his surviving spouse. This position

of the Commissioner was sustained by the Tax Court in that Court's original consideration of the *Estate of Rensenhouse*, 27 T. C. 107 (1956). On appeal of the case, however, the Commissioner again reversed his field and abandoned the position. *Estate of Rensenhouse* v. *Commissioner*, 252 F. 2d 566 (C.C.A. 6th, 1958). As hereinbefore pointed out, the decision of the court below may again give life to the view that no maintenance allowance can qualify as a marital deduction because it is inferable from the decision of the court below that the court meant to hold that a maintenance allowance never passes from the decedent to his surviving spouse.

After the Commissioner's flip-flop performance in *Estate of Rensenhouse*, *supra*, the Commissioner seems to have followed the vested right test of *Revenue Ruling* 83, *supra*, at least up until consideration of the instant case in the court below. In the court below, the Commissioner argued that the term "property" as used in Section 812(e) of the 1939 Code meant all the assets of the decedent's estate, and the court sustained this position of the Commissioner. This view of the matter seems to wash away the Commissioner's vested right test in respect of all allowances payable in instalments. Such instalment allowances as would not terminate on death or remarriage would still terminate at the end of the probate period and thus would terminate "upon the lapse of time" or "upon the occurrence of an event or contingency." Accordingly, the Commissioner's vested right test, if it has any vitality left at all after the decision by the court below, would appear now to sustain the deductibility only of lump sum maintenance allowances. In such circumstances, maintenance allow-

ances of comparatively few of the states would qualify for deduction under the marital deduction provisions.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,278 May 23, 1960

ESTATE OF EDWARD A. CUNHA, Deceased, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, *Executor, Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition to Review a Decision of The Tax Court of the United States

Before: STEPHENS, ORR and MERRILL, Circuit Judges.

ORR, Circuit Judge:

Edward A. Cunha, a resident of San Mateo County, California died testate on August 6, 1954, leaving surviving him his widow, Helen V. Cunha, and a son. Thereafter petitioner was duly appointed executor of the estate and in due course petitioned the court in which the probate proceedings were pending for an allowance for the widow's support until administration would be completed. Said court, pursuant to section 680 of the California Probate Code, entered an order granting Helen V. Cunha a "family allowance" of $600 a month, which amount it subsequently increased to $900. A total of $10,500 was paid pursuant to said order. The executors filed federal estate tax returns on behalf of said estate in which they claimed a deduction of the full $10,500 allowance paid the widow as a marital deduction under section 812(e) of the Internal Revenue

Code of 1939.[1] Sixty per cent of said deduction was subsequently disallowed by the Commissioner of Internal Revenue on the ground that the right to a widow's allowance under California law terminates upon the death or remarriage of the widow and, hence, it comes within the "terminable interest" limitation of section 812(e)(1)(B).[2] Forty per cent of the amount deducted was allowed because the Commissioner concluded that Helen V. Cunha's right to an allowance was vested to the extent that she or her estate would, in effect, receive that percentage of the allowance in any event as beneficiary under her husband's will of forty per cent of the residue of his estate.[3] The executor thereafter petitioned The Tax Court for review claiming that the full amount of the deduction should have been allowed.

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[1] "§ 812(e). Bequests, Etc., to Surviving Spouse.—

(1) Allowance of Marital Deduction.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 53 Stat. 123, as amended by Revenue Act 1948, c. 168, § 361(a), 62 Stat. 110.

[2] "(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest —

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse . . ."

[3] See Rev. Rul. 56-26, 1956-1 Cum. Bull. 447.

The Tax Court upheld the partial disallowance of said deduction. We have for review The Tax Court's decision.

There was in existence for some time section 812(b)(5) of the Internal Revenue Code of 1939 (53 Stat. 123, as amended) which permitted the deduction of a family allowance for tax purposes. While said section was in full force and effect, Congress enacted the provision for a marital deduction, so that it is apparent that there was no compelling reason to enact the marital deduction provision in order to provide for the "widow's allowance" deduction. In connection with the construction of the marital deduction provision it is interesting to consider the legislative history. The provision for a marital deduction was added to the Internal Revenue Code of 1939 by The Revenue Act of 1948 (See note 1 supra). The Senate Report accompanying said Act contains a statement that amounts expended for the support of a widow are not interests passing to a spouse within the meaning of the marital deduction provision. Senate Report No. 1013 (80th Cong., 2d Sess., 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1224. At that time, amounts actually expended for family support during administration of the decedent's estate were specifically deductible under section 812(b)(5), I.R.C. 1939 (53 Stat. 123, as amended). Two years later, however, Congress repealed that provision by section 502 of the Revenue Act of 1950, c. 994, 64 Stat. 906. According to the Senate Report accompanying said Act of 1950, repeal of Section 812(b)(5) was necessary for the reason that "[i]n practice it has discriminated in favor of estates located in states which have liberal allowances for the support of dependents. . . ." Senate Report No. 2375 (81st Congress, 2d Sess. 1950), 1950 U.S. Code Cong. Serv. Vol. II, p. 3112. Said report then states:

> Under existing law amounts expended for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allow-

able as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e). (Id., at p. 3191.)

As heretofore pointed out, the Senate Report accompanying the Act which introduced the marital deduction provision two years earlier had stated that a widow's allowance was not an interest passing to a spouse within the meaning of that provision. At a later time, however, the Commissioner conceded that a widow's allowance was an interest in property which passed to the widow within the meaning of the marital deduction provision and would qualify for the deduction if the right to an allowance under applicable state law was vested in a manner such that the widow or her estate would receive payments in any event. See Rev. Rul. 83, 1953-1 Cum. Bull. 395; Rev. Rul. 56-26, 1956-1 Cum Bull. 447. Deductions of widow's allowances have been upheld where under state law the widow's interest was so vested. See Estate of Proctor D. Rensenhouse, 31 T.C. 818 (1959), King v. Wiseman, 147 F. Supp. 156 (W.D. Okla. 1956); Molner v. U.S., 175 F. Supp. 271 (N.D. Ill. 1959). But that is not the instant case. It is admitted here that a widow's right to an allowance in California terminates upon her death or remarriage. Petitioner contends none-the-less that the California allowance does not come within the terminable interest rule when properly construed.

The value of an interest in property passing to a spouse from the decedent is a non-deductible terminable interest under section 812(e)(1)(B) (set forth in note 2 supra) if three conditions are met. First, it must be an interest in property which will terminate upon the occurrence of an event or the lapse of time, etc. Second, another interest in the same property must pass or have passed to someone

other than the spouse from the decedent for less than an adequate consideration. Third, such other person must be able to possess or enjoy a part of such property upon the termination of the spouse's interest therein. Unless the interest in question meets all three of these conditions, it is not disqualified by reason of the terminable interest rule. Taxpayer concedes that a California widow's allowance meets the first condition but argues that *the right* to a widow's allowance is the "property" referred to in section 812(e) and that no person other than the widow has an interest in "such property" or will at any time possess or enjoy any part of "such property". To the contrary, the government argues that the term "property" encompasses the estate assets, the right to the allowance being an "interest" in "such property", and that the son has, in the instant case, an "interest in such property" as a residuary legatee and will possess and enjoy a part of "such property" after the widow's interest terminates. So, we are confronted with the question of whether the right to a widow's allowance is itself "property" or merely an "interest" in "property", namely the estate assets. The precise question has been considered in two cases. The Tax Court, by way of dictum, in the case of Estate of Proctor D. Rensenhouse, supra, dismissed a like contention by the taxpayer as ingenious but erroneous, although a vigorous dissent supporting the taxpayer appears. In Quivey v. U.S., 176 F. Supp. 433 (D. Neb. 1959), a contrary result was reached.

The correct meaning of the word "property" as used in section 812(e) is the key to the solution of the problem. The definition of words used in federal tax statutes is governed by federal law. Lyeth v. Hoey, 305 U.S. 188 (1938); Burnet v. Harmel, 287 U.S. 103 (1932). The Senate Report accompanying the Revenue Act of 1948 provides persuasive evidence of what Congress intended to encompass by the use of the terms "property" and "interest". The relevant portion of the report is set out in note

4 below,[4] from which we conclude that the word "property" was intended to encompass all rights "susceptible of ownership", all lesser rights being "interests" in other property. See In Re Reilly's Estate, 239 F. 2d 797 (3d Cir. 1957). It is necessary to examine the examples given in said report in order to determine what the committee intended the phrase "rights susceptible of ownership" to mean. An annuity is given as an example of such a right. Senate Report No. 1013 (80th Cong., 2d Sess. 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1234, example 2. On the other hand:

> "In the case of a trust *or fund*, the income beneficiaries *and the persons entitled to receive any part of the corpus* have an interest in the property represented by the assets of the trust or fund *as of the date of the decedent's death*. Id., at p. 1229 [Emphasis supplied].

This points up that a legacy of $900 a month to the surviving spouse "during the time necessary to complete administration of my estate" would be an "interest" in "property" represented by the estate assets, and not

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[4] "The terms 'interest' and 'property' as used in section 812(e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent of ownership, that is, to the estate or the quality or quantum of ownership by the surviving spouse or other person, of particular property. For example, if the surviving spouse is specifically devised an estate for her life in a farm, the 'interest' passing to her is the life estate, and the property in which such interest exists is the farm. Generally the property in which any person is considered as having an interest is the property out of which, or the proceeds of which, such interest may be satisfied. Thus, in the case of a bequest, devise, or transfer of an interest which may be satisfied out of, or with the proceeds of, any property of the decedent's general estate or of a trust; the interest so bequeathed, devised or transferred is an interest in any and all of such property . . ." Senate Report No. 1013 (80th Cong., 2d Sess. 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1225.

"property" itself, at the date of the testator's death. See also Surrey, The Revenue Act of 1948, 61 Harv. L. Rev. 1097, 1131 note 126 (1948). We fail to see wherein the right to receive a widow's allowance of $900 a month is more a "right susceptible of ownership" than is the right to such a legacy.

The right to receive a widow's allowance must be characterized according to the attributes it possesses at the instant of the decedent's death. The Senate Report of 1948 states in this regard that "[i]n determining whether an interest is a terminable interest *and whether the conditions of clauses (i) and (ii) are met*, the situation must be viewed as at the date of the decedent's death. . . ." Senate Report No. 1013 (80th Congress, 2d Sess. 1948) 1948 U.S. Code Cong. Serv., Vol. II, p. 1232 [Emphasis supplied]. See Sheedl's Estate v. Commissioner, 237 F. 2d 345 (9th Cir. 1956); Starrett v. Commissioner, 223 F. 2d 163 (1st Cir. 1955); Kasper v. Kellar, 217 F. 2d 744 (8th Cir. 1954). To identify the "property" referred to in section 812(e) as the "assets actually paid to the widow out of the gross estate of the decedent, no more or no less," as did the court in Quivey v. U.S., 176 F. Supp. 433, 439 (D. Neb. 1959), is to view the situation not as it existed "as at the time of the decedent's death" but rather from a point in time after the widow had been paid. The widow has only the right to apply for an allowance at the time of her husband's death, the right to an allowance itself not accruing until after a court order granting it. Estate of Blair, 42 C. 2d 728, 269 P. 2d 612 (1954). But see Estate of Proctor D. Rensenhouse, supra. The actual amount of the allowance, its duration and subsequent modification are in the wide discretion of the court. Estate of Nelson, 167 Cal. 321, 139 Pac. 692 (1914). The right to receive payments terminates upon the death or remarriage of the widow and in any event upon completion of administration, and the right is personal to the widow and cannot be assigned or given away. Estate of Blair, supra; Estate

of Hamilton, 66 Cal. 576, 6 Pac. 493 (1885). Such are the essential attributes of the right to an allowance in California, looked at as of the time of the death of the surviving spouse's husband. Said attributes are not those one associates with the "bundle of rights" ordinarily thought of as ownership. The instant right has even less of those attributes commonly associated with ownership of property than a right to receive an allowance derived from a decedent's will, which latter right, as previously pointed out, is given as an example in the Senate Report of a right which is not "property" in itself. In identifying the property referred to in section 812(e), therefore, the general rule stated in the Senate Report, namely that "[g]enerally the property in which any person is considered as having an interest is the property out of which or the proceeds of which, such interest may be satisfied," should be applied. Senate Report No. 1013, (80th Cong., 2d Sess. 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1225 (quoted in note 4 supra). The California widow's allowance is payable out of the estate of the decedent and the order granting an allowance creates a preferred charge upon the entire estate. See Estate of King, 19 C. 2d 354, 121 P. 2d 716 (1942). The term "property" used in section 812(e), as applied to a widow's allowance in California refers to the assets of the estate and not to the right to receive the allowance.

Petitioner says that if the term "property" is construed to refer to the estate assets, then a marital deduction would be allowed for widow's allowances in states providing for lump sum payments and not in those where the allowance is payable in installments. Such a result, it is argued, defeats the goal Congress sought to attain of giving equal federal tax treatment to the residents of the different states. The provision for a marital deduction was intended to be remedial because "[t]he basic differences between property rights in community and non-community property states . . . resulted in geographic inequalities in the effect

of the estate . . . tax." Senate Report No. 1013 (80th Cong. 2d Sess. 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1118. Similarly, the terminable interest rule was necessary to ". . . equate the decedefit in the common law state with the decedent in the community property state who cannot by his will effect in any way the surviving spouse's interest in the community property." Id., at p. 1190. The general policy of geographical equalization does not persuade us, however, that the word "property" should be construed in a manner contrary to the definition and examples given in the 1948 Senate Report. Deductibility under the test Congress has adopted depends upon the character of a right, not its similarity in source (state statute) and purpose (support of widows) to other transfers which are deductible, and a right can only be so characterized by looking to the attributes state law bestows upon it. As Professor Surrey pointed out at the time the provision was enacted, ". . . the plan to achieve complete equalization is inherently incapable of accomplishing its purpose. . . . Estate splitting adopts no such nationwide uniform plan that can operate in essential disregard of local property rules, or, rather, that can operate with uniformity regardless of local variations." Surrey, The Revenue Act of 1948, 61 Harv. L. Rev. 1097, 1156-1157 (1948). See also Anderson, Marital Deduction Equalization, 54 Mich. L. Rev. 1087, 1109 (1956) ("And so we find that a rule, that of the terminable interest, designed to equalize the conflicts in property systems may itself be the cause of substantial inequality.") As to this problem generally, see Oliver, State Law in Federal Tax Proceedings, 41 Cal. L. Rev. 638 (1953). Absent an express provision that widow's allowances be deductible regardless of the character under state law of the right to receive such an allowance, we must treat such transfers to the spouse as we would any other, such as a like transfer made by will. Our heretofore expressed conclusion, derived from the definition and examples given in the Senate Report of 1948, that the right to receive a widow's allowance is not

"property" as that term is used in section 812(e) is in no way weakened by the fact that lump sum allowances provided for in other states have been held deductible where not subject under state law to a survival requirement.

In considering the committee reports accompanying the Revenue Act of 1950 petitioner takes the view that they indicate that Congress in repealing section 812(b)(5), which expressly allowed deduction of widow's allowances, intended that such amounts be thereafter allowed as a marital deduction under section 812(e). See Senate Report No. 2375, (81st Cong. 2d Sess. 1950), 1950 U.S. Code Cong. Serv., Vol. II, p. 3191 (quoted earlier herein); House Report No. 2319 (81st Cong. 2d Sess. 1950) p. 136. Granted that such an intention is indicated in said reports, they bear no weight. Statements made by a Congressional committee in a 1950 report can be no more than an expression of opinion on what Congress intended two years earlier when it enacted the marital deduction provision in the Revenue Act of 1948. This is especially true where the Senate Report of 1948 accompanying said Act of that year contains an express statement that widow's allowances are not interests passing to a spouse within the meaning of the marital deduction provision. Senate Report No. 1013 (80th Cong., 2d Sess. 1948), 1948 U.S. Code Cong. Serv., Vol. II, p. 1224.

We conclude that the right to a widow's allowance in California is a terminable interest in the estate assets; that in the instant case another interest in said assets passed from the decedent to his son for less than an adequate consideration; and that the son is entitled to possess and enjoy a portion of said assets upon the termination of the widow's right to an allowance. The decision of The Tax Court is, therefore, affirmed.

DECISION AFFIRMED

(Endorsed) Opinion Filed May 23, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ESTATE OF EDWARD A. CUNHA, Deceased, BANK OF AMERICA, NATIONAL TRUST & SAVINGS ASSOCIATION, Executor, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Judgment

Petition to Review a Decision of the Tax Court of the United States

This cause came to be heard on the Transcript of Record from the United States Tax Court, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Decision of the said Tax Court in this cause be, and hereby is affirmed.

(ENDORSED)

Filed and Entered: May 23, 1960

FRANK H. SCHMID, Clerk.

APPENDIX C

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

"(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(D) *Interest of Spouse Conditional on Survival for Limited Period.*—For the purposes of subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(ii) such termination or failure does not in fact occur.

* * * * *

(3) *Definition.*—For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—

(A) such interest is bequeathed or devised to such person by the decedent; or

(B) such interest is inherited by such person from the decedent; or

(C) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent; or

(D) such interest has been transferred to such person by the decedent at any time; or

(E) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship; or

(F) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default upon the release or nonexercise of such power; or

(G) such interest consists of proceeds of insurance upon the life of the decedent receivable by such person.

Except as provided in subparagraph (F) or (G) of paragraph (1), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for the purposes of clauses (i) and (ii) of subparagraph (B) of paragraph (1), be considered as passing from the decedent to a person other than the surviving spouse.

(26 U.S.C. 1952 ed., Sec. 812.)

APPENDIX D

California Probate Code

Sec. 680. (Right to allowance: Who entitled: Necessity: Duration: Preference: Time of taking effect.) The widow, widower and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in the case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Sec. 681. When may be granted: (Power of court: Granting prior to inventory: Subsequent granting or modification: Hearing: Notice.) Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

Sec. 682. (Where parties have other support: Need for allowance as affecting granting thereof.) If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.

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JAMES R. BROWNING, Clerk

No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1960

ESTATE OF EDWARD A. CUNHA, DECEASED, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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CHARLES K. RICE,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and other authorities involved	2
Statement	2
Argument	3
Conclusion	8
Appendix	9

CITATIONS

Cases:

Blair, Estate of, 42 Cal. 2d 728, 269 P. 2d 612	4
Hamilton, Estate of, 66 Cal. 576, 6 Pac. 493	4
Ithaca Trust Co. v. United States, 279 U.S. 151	5
Kasper v. Kellar, 217 F. 2d 744	5
Meyer v. United States, No. 13, this Term, decided November 21, 1960	3, 5
Quivey v. United States, 176 F. Supp. 433	6
Shafer v. United States, C.C.H. Fed. Estate and Gift Tax Rep., par. 11,949	6
Shedd's Estate v. Commissioner, 237 F. 2d 345, certiorari denied, 352 U.S. 1024	5

Statutes:

California Probate Code, Secs. 680-682 (53 West's Ann. California Codes, 1956)	4
Internal Revenue Code of 1939:	
Sec. 812(b) (26 U.S.C. 1952 ed., Sec. 812(b))	6
Sec. 812(e) (26 U.S.C. 1952 ed., Sec. 812(e))	2, 4, 9, 13
Internal Revenue Code of 1954, Sec. 2056 (26 U.S.C. 2056)	13
Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 361	6

Miscellaneous:

	Page
Rev. Rul. 83, 1953–1 Cum. Bull. 395	6, 7
Rev. Rul. 56–26, 1956–1 Cum. Bull. 447	2, 6, 7, 13
S. Rep. No. 1622, 83d Cong., 2d Sess	7
Treasury Regulations 105:	
Sec. 81.47b(a)	2, 10
Sec. 81.47b(d)	2, 11

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 24–33) is reported at 30 T.C. 812. The opinion of the Court of Appeals (R. 43–51; Pet. 1a–10a) is reported at 279 F. 2d 292.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1960. (R. 52; Pet. 11a.) A petition for rehearing was denied on August 31, 1960. (R. 53; Pet. 2.) The petition for a writ of certiorari was filed on November 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly sustained the Commissioner's determination that 60 per cent of the amount paid to a widow for her support during the settlement of her husband's estate is not deductible as a part of the marital deduction under Section 812 (e) of the Internal Revenue Code of 1939.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of Section 812(e) of the Internal Revenue Code of 1939, Section 81.47b of Treasury Regulations 105, and Revenue Ruling 56-26, 1956-1 Cum. Bull. 447, are set forth in the Appendix, *infra*, pp. 9-15.

STATEMENT

The undisputed facts may be summarized as follows:

The decedent died testate on August 6, 1954, a resident of California. He was survived by his wife, Helen, and his son, William. The decedent's will and codicils were duly probated, and the petitioner, the Bank of America, National Trust & Savings Association, was appointed executor of the estate. (R. 13-14, 25; Pet. 2-3.)

Pursuant to orders of the probate court, the executor paid to the widow, during the period of the probate proceedings, a monthly allowance for maintenance which totaled $10,500 (R. 14, 19-21, 25-26; Pet. 3).

The decedent's will, after making some small specific bequests, gave forty per cent of his residuary

estate to his widow and sixty per cent to his son. In the estate tax return, the executor deducted the total sum of $10,500 from the value of the gross estate, as part of the marital deduction. The Commissioner disallowed sixty per cent of that amount, and increased the estate tax accordingly (R. 9–10, 14–16, 26; Pet. 3). The Tax Court upheld the Commissioner (R. 33; Pet. 4), and the Court of Appeals unanimously affirmed (R. 51; Pet. 5).

ARGUMENT.

Section 812(e) of the Internal Revenue Code of 1939 (App. *infra*, pp. 9–10) provides for a marital deduction from the value of the gross estate of an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 812(e)(1)(B) provides, however, that no marital deduction shall be allowed (1) if the interest passing to the surviving spouse will terminate or fail upon the occurrence or non-occurrence of any event or contingency, or upon the lapse of time, and (2) if any interest in the property passes or has passed from the decedent to some other person who may possess or enjoy any part of the property upon termination or failure of the surviving spouse's interest. *See Meyer* v. *United States*, No. 13, this Term, decided November 21, 1960. The question in this case is whether sixty per cent of the widow's allowance was properly excluded from the

marital deduction on the ground that it came within the foregoing limitation.

Both courts below held (R. 32–33; Pet. 7a–8a), and petitioner does not deny, that under California law the widow had only a contingent interest in sixty percent of the allowance when awarded by the probate court, since that proportion was subject to termination upon her death or remarriage during the probate proceedings. California Probate Code, Secs. 680–682 (53 West's Ann. California Codes, 1956); *Estate of Blair*, 42 Cal. 2d 728, 269 P. 2d 612; *Estate of Hamilton*, 66 Cal. 576, 6 Pac. 493. Petitioner contends (Pet. 4), however, that the entire widow's allowance should have been included in the marital deduction, on the theory that "only the surviving widow had an interest in the maintenance allowance granted her by the probate court, that such maintenance allowance was the 'property' as that term is used in Section 812(e) of the 1939 Code, that no interest in such property passed to a person other than the widow and no such other person could possess or enjoy any part of such property, and that, accordingly, the maintenance allowance was not a nondeductible terminable interest."

We submit that both courts below properly rejected this strained interpretation of Section 812(e). As the court of appeals correctly held (Pet. 6a–7a), the right to receive a widow's allowance during the time necessary to complete the administration of the estate is "an 'interest' in 'property' represented by the estate assets, and not 'property' itself.

at the date of the testator's death." "The term 'property' used in section 812(e), as applied to a widow's allowance in California refers to the assets of the estate and not to the right to receive the allowance" (Pet. 8a).

The basic flaw in petitioner's argument is its failure to recognize and apply the settled principle that the right to a marital deduction must be determined on the basis of the situation as it existed at the time of the decedent's death and not on the basis of what the surviving spouse actually received. *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9), certiorari denied, 352 U.S. 1024; *Kasper* v. *Kellar*, 217 F. 2d 744 (C.A. 8); cf. *Meyer* v. *United States*, No. 13, this Term, decided November 21, 1960; *Ithaca Trust Co.* v. *United States*, 279 U.S. 151. Under California law, the widow received a forty-percent vested interest in the decedent's residuary estate, and that percentage of the allowance would have gone to her or to her estate even if no support allowance had been granted, and whether or not she died or remarried during the probate period. However, the sixty-percent balance would have gone to the son under the will, if it had not been paid to the widow. As to this proportion of the allowance, therefore, the son had an interest in the property (the assets of the decedent's estate) which he would have received if the widow had died or remarried prior to the time the full allowance had been paid her. Accordingly, the sixty percent of the widow's allowance was properly disallowed as a marital deduction, since it was a terminable interest and

not a vested right of property which, in the event of her death or remarriage immediately following the decedent's death, would have been an asset of her estate. Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56–26, 1956–1 Cum. Bull. 447 (Appendix, *infra*, pp. 13–15).

Petitioner contends (Pet. 5) that the decision below is in conflict with *Quivey* v. *United States*, 176 F. Supp. 433 (D. Neb.), and *Shafer* v. *United States*, C. C. H. Fed. Est. and Gift Tax Rep., par. 11949 (S.D. Iowa), in which marital deductions were permitted for widow's allowances. Both of those cases, however, are now on appeal to the Court of Appeals for the Eighth Circuit, and there is accordingly no conflict among circuits on this question. Petitioner also stresses (Pet. 7) a statement in the Senate and House Committee Reports on the Revenue Act of 1950 that, as a result of an amendment to Section 812 there made, "such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)."[1] But this statement shows on its face that Congress was not thereby attempting to grant all widow's allowances a marital deduction, but only those which met "the conditions and limitations of section 812(e)." And, as we have shown, sixty percent of the

[1] Prior to the 1950 Act, Section 812(b) of the 1939 Code permitted the deduction from the gross estate of widows' allowances to the extent "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent." The provision for the marital deduction was added to the Code by Section 361 of the Revenue Act of 1948, c. 168, 62 Stat. 110.

widow's allowance here did not meet those conditions and limitations. If petitioner's views were correct, all widow's allowances that are actually paid would qualify for the marital deduction. Congress, however, has refused to permit such a broad deduction, and instead has limited it to cases where the allowance satisfies the strict standards of Section 812(e). See, for example, S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125.

The decision below does not hold, as petitioner urges (Pet. 9), that only lump-sum allowances, but not those payable in installments, could qualify for the marital deduction. For the test is whether under the applicable law the widow's right vested indefeasibly in her at the time of the decedent's death; and, if it did, it makes no difference whether the allowance is payable in a lump sum or in installments. Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56–26, 1956–1 Cum. Bull. 447 (Appendix, *infra*, pp. 13–15). Nor is there any basis for petitioner's suggestion (Pet. 7) that the court below may have held that widow's allowances are not interests passing to the surviving spouse within the meaning of the marital-deduction provision, and therefore that no such allowance can ever qualify for the marital deduction. The court below held (Pet. 10a) only "that the right to a widow's allowance in California is a terminable interest in the estate assets; that in the instant case another interest in said assets passed from the decedent to his son for less than an adequate consideration; and that the son is entitled

to possess and enjoy a portion of said assets upon the termination of the widow's right to an allowance."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROBERT N. ANDERSON,
L. W. POST,
Attorneys.

DECEMBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(D) *Interest of Spouse Conditional on Survival for Limited Period.*—For the purposes of subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(ii) such termination or failure does not in fact occur.

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.47b [as added by T.D. 5699, 1949-1 Cum. Bull. 181]. *Nondeductible Interests.*—(a) *General.*—The property interests which passed from the decedent to his surviving spouse (as set forth in section 81.47a) fall within two general categories: (1) those with respect to which

the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deductible interests" and "nondeductible interests," respectively. As to the several classes of "nondeductible interests," see paragraphs (b) to (f), inclusive, of this section. Subject to the limitation set forth in section 81.47d, the marital deduction is equal in amount to the aggregate value of the "deductible interests," that is, the property interests which passed from the decedent to his surviving spouse and do not fall within any of the classes described in such paragraphs (b) to (f).

* * * * *

(d) *Interest in property which another person may possess or enjoy.*—Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same

instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 812(e), and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

Interests which passed to a person other than the surviving spouse include interests so passing under the decedent's exercise, release, or nonexercise of a nontaxable power to appoint. It is immaterial whether the property interest which passed from the decedent to a person other than his surviving spouse is included in the decedent's gross estate.

The term "person other than his surviving spouse" includes the possible unascertained takers of a property interest, as, for example, the members of a class to be ascertained in the future. As another example, assume that the decedent created a power of appointment over a property interest, which does not come within the purview of paragraph (c) or (d) of section 81.47a. In such a case, the term "person other than his surviving spouse" refers to the possible appointees and possible takers in default (other than the spouse) of such property interest. Whether there is a possibility that the

"person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

* * * * *

Rev. Rul. 56-26, 1956-1 Cum. Bull. 447:

* * * * *

Advice has been requested whether amounts paid to a surviving widow as an allowance for support will qualify for the marital deduction authorized by section 2056 of the Internal Revenue Code of 1954 under the circumstances set forth below.

The decedent died testate leaving his entire probate estate to his surviving wife. Pursuant to an order of the local probate court, the widow was entitled to an allowance for support during the period of settlement of the deceased spouse's estate.

Revenue Ruling 83, C.B. 1953-1, 395, sets forth the general rule to be followed in such cases. Such rule is to the effect that, in order to qualify for the marital deduction, a property interest in the form of an allowance made, pursuant to local law, for the support of the decedent's spouse, must be a vested right of property, such as will, in the event of the spouse's death as of any moment or time following the decedent's death, survive as an asset of her estate. Otherwise, such allowance constitutes a terminable interest within the meaning of section 2056(b) of the 1954 Code and, as such, does not qualify for the deduction.

---

[2] Rev. Rul. 56-26 refers specifically to Section 2056(b) of the Internal Revenue Code of 1954, but this does not differ from Section 812(e)(1)(B) of the 1939 Code, with which we are here concerned, in any material respect. Hence the ruling is applicable here.

The terminable interest rule of section 2056(b) does not apply, however, unless (1) an interest in the property also passed from the decedent (whether by will or under local law) to someone other than his surviving spouse, *or the estate of such spouse*, and (2) by reason of such passing such other person may possess or enjoy such property after the termination or failure of the interest therein which passed to the surviving spouse. Thus, assume a case where a decedent leaves property to his widow for life, with remainder to her estate (executors or administrators). The life estate given is clearly a terminable interest, but as no interest in the property passed to anyone other than the widow, or the estate of the widow, the rule set forth in section 2056(b) does not apply and the entire interest qualifies for the marital deduction.

The same would apply in respect of the interest of the instant decedent's widow in the form of her support allowance. Since the decedent left her his entire probate estate, no interest in the amounts awarded for her support during the settlement of the estate may, for the purposes of section 2056, be considered as having passed to any person other than his spouse, or the estate of such spouse. In other words, while the widow's death at any time following the decedent's death would have terminated her right to any further support allowance, any amounts remaining unpaid would, nevertheless, become a part of the residuary estate and, as such, would pass to her estate under the terms of her husband's will. Thus, the requirement of section 2056 of the statute, as more particularly set forth in Revenue Ruling 86, *supra*, has been met, and the marital deduction is allowable.

So long as the interest passing to the surviving spouse, when viewed as of the decedent's

death, is an indefeasibly vested interest, it is immaterial whether the statutory requirement in the foregoing respect is satisfied by reason of the applicable provisions of the local law, by reason of the terms of the decedent's will, or otherwise. Therefore, the same rules would apply in the case of an intestate share in the decedent's estate. For example, if the decedent died intestate and one-third of his estate passed to his surviving spouse as absolute owner under the intestacy laws of the jurisdiction, then one-third of any amounts paid out of the estate, pursuant to local law, for the support of such spouse, is a deductible interest since, to that extent, it in effect merely represents an advancement from property which is already indefeasibly hers and will pass to her, or to her estate, in any event.

In view of the foregoing, it is held that while amounts allowed for the support of the surviving spouse during the period of settlement of the deceased spouse's estate may otherwise constitute a nondeductible interest under section 2056(b) of the Internal Revenue Code of 1954, such amounts may nevertheless qualify for the estate tax marital deduction to the extent that all or any part of the residuary estate of the decedent passed from the decedent to his surviving spouse by intestacy or as beneficiary under his will.